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PROCUREMENT

Guide to Enactment

of

UNCITRAL Model Law on Procurement of Goods, Construction and Services

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INTRODUCTION

History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services

1. At its nineteenth session, in 1986, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work in the area of procurement. The UNCITRAL Model Law on Procurement of Goods and Construction, and its accompanying Guide to Enactment, were adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993). The Model Law on Procurement of Goods and Construction is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists. The text of the Model Law on Procurement of Goods and Construction is set forth in annex I to the report of UNCITRAL on the work of its twenty-sixth session (Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)).

2. On the understanding that certain aspects of the procurement of services were governed by different considerations from those that governed the procurement of goods or construction, a decision had been made to limit the work at the initial stage to the formulation of model legislative provisions on the procurement of goods and construction. At the twenty-sixth session, having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services. Accordingly, at the twenty-seventh session (New York, 31 May-17 June 1994), the Commission discussed additions and changes to the Model Law on Procurement of Goods and Construction that would need to be made so as to encompass procurement of services and adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the "Model Law"), without thereby superseding the earlier text, whose scope is limited to goods and construction. The text of the Model Law is set forth in annex I to the report of UNCITRAL on the work of its twenty-seventh session (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)). At the same session, the Commission also adopted the present Guide as a companion to the Model Law.

3. The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds. While sound laws and practices for public sector procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy.

4. Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

5. UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on the Limitation Period in the International Sale of Goods, on Carriage of Goods by Sea ("Hamburg Rules"), on Liability of Terminal Operators in International Trade, and on International Bills of Exchange and International Promissory Notes), model laws (in addition to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Laws on International Commercial Arbitration and International Credit Transfers), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts, countertrade transactions and electronic funds transfers).

Purpose of this Guide

6. In preparing and adopting the Model Law, the Commission was mindful that the Model Law would be a more effective tool for States modernizing their procurement legislation if background and explanatory information would be provided to executive branches of Governments and to parliaments to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of procurement procedures in the Model Law.

7. The information presented in the Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a modern procurement law designed to achieve the objectives set forth in the Preamble to the Model Law. Such information might assist States also in exercising the options provided for in the Model Law and in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances. For example, options have been included on issues that were expected in particular to be treated differently from State to State such as: the definition of the term "procuring entity", which involves the scope of application of the Model Law; imposition of the requirement of a higher approval for certain key decisions and actions in the procurement proceedings; methods of procurement other than tendering for exceptional cases in the case of goods or construction, or, in the case of services, methods other than the principal method for procurement of services; and the form of and remedies available under review procedures. Furthermore, taking into account that the Model Law is a "framework" law providing only a minimum skeleton of essential

provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.

I. MAIN FEATURES OF THE MODEL LAW

A. Objectives

8. The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the Government purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell to the Government are confident of obtaining fair treatment.

B. Scope of the Model Law

9. The Model Law as adopted by UNCITRAL at its twenty-seventh session is designed to be applicable to the procurement of goods, construction and services. Within that basic scope of application, the objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of defence and security related procurement, as well as other sectors that might be indicated by the enacting State in the law or its implementing procurement regulations, an enacting State might decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law. In order to facilitate the widest possible application of the Model Law, it is provided in article 1(2) that, even in the excluded sectors, it is possible, at the discretion of the procuring entity, to apply the Model Law. It is also important to note that article 3 gives deference to the international obligations of the enacting State at the intergovernmental level. It provides that such international obligations (e.g., loan or grant agreements with multilateral and bilateral aid agencies containing specific procedural requirements for the funds involved; procurement directives of regional economic integration groupings) prevail over the Model Law to the extent of any inconsistent requirements.

10. The Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation phase. Accordingly, one will not find in the Model Law provisions on issues arising in the contract implementation phase, issues such as contract administration, resolution of performance disputes or contract termination. The enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.

11. To take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth in chapter IV a set of procedures especially designed for the procurement of services. The main differences referred to above in paragraph 2 arise from the fact that, unlike the procurement of goods

and construction, procurement of services typically involves the supply of an intangible object whose quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction where price is the predominant criterion in the evaluation process, the price of services is often not considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors. Chapter IV is intended to provide procedures that reflect these differences.

C. A "framework" law to be supplemented by procurement regulations

12. The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of "procurement regulations" to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State -- without compromising the objectives of the Model Law.

13. It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law.

D. Procurement methods in the Model Law

14. The Model Law presents several procurement methods to enable the procuring entity to deal with the varying circumstances that it might encounter, as well as to take account of the multiplicity of methods that are used in practice in different States. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For normal circumstances in the procurement of services, the Model Law prescribes the use of the "principal method for procurement of services" (chapter IV), which is designed to give due weight in the evaluation process to the qualifications and expertise of the service providers. For the exceptional circumstances in which tendering is not appropriate or feasible for procurement of goods or construction, the Model Law offers alternative methods of procurement; it also does so for the circumstances in which resort to the principal method for procurement of services is not appropriate or feasible.

15. However, as mentioned in the footnote to article 18 of the Model Law, States may choose not to incorporate all of the alternative methods of procurement into their national law. While an enacting State would wish to retain request for quotations and single-source

procurement, it need not incorporate all of the methods set forth in article 19. Furthermore, since the procedures for the methods in article 19 are in many respects similar to the procedures in the principal method for procurement of services (chapter IV), the enacting State may choose not to extend to procurement of services a method in article 19 that it has incorporated for use in procurement of goods and construction.

Tendering

16. Some of the key features of tendering as provided for in the Model Law include: as a general rule, unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the goods, construction or services to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract.

Principal method for procurement of services

17. Since the principal method for procurement of services (chapter IV) is the method of procurement to be used in typical circumstances in the procurement of services, chapter IV contains procedures that promote competition, objectivity and transparency, while taking account of the predominant weight accorded to the qualifications and expertise of the service providers in the evaluation process. The main features of the principal method for procurement of services include, for example, unrestricted solicitation of suppliers and contractors as the general rule, and predisclosure in the request for proposals of the criteria for evaluation of proposals and predisclosure of the selection procedure, among the three options available, to be used in the selection process. According to the first selection procedure, which is set forth in article 42, the procuring entity subjects proposals that obtain a technical rating above a set threshold to a straightforward price competition. The second selection procedure (article 43) provides a method by which the procuring entity negotiates with suppliers and contractors, after which they submit their best and final offers, a process akin to the request for proposals procedure in article 48. Under the third selection procedure (article 44), the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating. Under this procedure, the procuring entity may negotiate with the other suppliers or contractors in a sequential fashion, one by one, on the basis of their rating, but only after terminating negotiations with the previous, higher-ranked supplier or contractor, which negotiations, once terminated, may not be reopened.

Two-stage tendering, request for proposals, competitive negotiation

18. For cases in the procurement of goods and construction in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, as well as for a number of other special circumstances referred to in article 19(1), the Model Law offers three options for incorporation into national law.

These include two-stage tendering, request for proposals, and competitive negotiation. Whichever of those three procurement methods have been included by the enacting State in its law might also be used for procurement of services. However, for one of these other methods to be used, the condition for its use would have to be present. All three of those methods of procurement have been included for consideration by enacting States because practice varies as to the method used in circumstances of the type in question. A situation in which it is not feasible for the procuring entity to formulate precise or final specifications may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g., it has not decided upon the type of material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In the latter type of exceptional case, because of the technical sophistication and complexity of the goods, it might be considered undesirable, from the standpoint of obtaining the best value, for the procuring entity to proceed on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered.

19. No hierarchy has been assigned to the three methods set forth in article 19, and an enacting State, though it should incorporate at least one of those methods, may choose not to incorporate all of them into its procurement law. While each of those three methods shares the common feature of providing the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms, they employ different procedures for selecting a supplier or contractor.

20. Two-stage tendering, in its first stage, provides an opportunity for the procuring entity to solicit various proposals relating to the technical, quality or other characteristics of the procurement as well as to the contractual terms and conditions of its supply. Upon the conclusion of that first stage, the procuring entity finalizes the specifications and, on the basis of those specifications, in the second stage, conducts a regular tendering proceeding subject to the rules set forth in chapter III of the Model Law. Request for proposals is a procedure in which the procuring entity typically approaches a limited number of suppliers or contractors and solicits various proposals, negotiates with them as to possible changes in the substance of their proposals, requests "best and final offers" from them and then assesses and compares those best and final offers in accordance with the predisclosed evaluation criteria, the relative weight and manner of application of which have also been predisclosed to the suppliers or contractors. By contrast to two-stage tendering, at no stage in request-for-proposals proceedings does a procuring entity conduct a tendering proceeding. Competitive negotiation differs from both two-stage tendering and request for proposals in that it is by its nature a relatively unstructured method of procurement, for which the Model Law therefore provides few specific procedures and rules, beyond those found in the applicable general provisions. The Model Law also provides, in article 19(2), that competitive negotiation may be used in cases of urgency as an alternative to single-source procurement (see comment 4 on article 19).

Restricted tendering

21. For two types of exceptional cases, the Model Law offers restricted tendering, a method of procurement that differs from tendering only in that it permits the procuring entity

to extend the invitation to tender to a limited number of suppliers or contractors. These are the case of technically complex or specialized goods, construction or services available from only a limited number of suppliers and the case of procurement of such a low value that economy and efficiency is served by restricting the number of tenders that would have to be considered by the procuring entity.

Request-for-quotations, single-source procurement

22. For cases of low-value procurement of standardized goods or services, the Model Law offers the request-for-quotations method, which involves a simplified, accelerated procedure fitting the relatively low value involved. Under this method, which is sometimes referred to in practice as "shopping", the procuring entity solicits quotations from a small number of suppliers and selects the lowest-priced, responsive offer. Lastly, for exceptional circumstances such as urgency due to catastrophic events and the availability of goods, construction or services from only one supplier or contractor, the Model Law offers single-source procurement.

E. Qualifications of suppliers and contractors

23. The Model Law includes provisions designed to ensure that the suppliers and contractors with whom the procuring entity contracts are qualified to perform the procurement contracts awarded to them and that create a procedural climate conducive to fairness and participation by qualified suppliers and contractors in procurement proceedings. Article 6, in addition to requiring that, no matter which method of procurement is utilized, suppliers and contractors must be qualified in order to enter into a procurement contract, specifies the criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors, requires the pre-disclosure to suppliers and contractors of the criteria to be used for the evaluation of their qualifications, and requires the application of the same criteria to all suppliers or contractors participating in the procurement proceedings. While those provisions aim at equal treatment and prevention of arbitrariness, the procuring entity is afforded sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding. In addition to those basic provisions on qualifications, the Model Law provides procedures for pre-qualification of suppliers and contractors at early stages of procurement proceedings, as well as on re-confirmation at later stages of the qualifications of suppliers and contractors that had been pre-qualified.

F. Provisions on international participation in procurement proceedings

24. In line with the mandate of UNCITRAL to promote international trade, and with the notion underlying the Model Law that the wider the degree of competition the better the value received for expenditures from the public purse, the Model Law provides that, as a general rule, suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality and that foreign suppliers and contractors should not otherwise be subject to discrimination. In the contexts of tendering proceedings and the principal method for procurement of services, that general rule is given effect by a number of procedures designed, for example, to ensure that invitations to tender or to submit

proposals and invitations to prequalify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

25. At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition. Such restrictions are subject to the requirement in article 8(1) that the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law. That requirement is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation. The reference in article 8 to exclusions of suppliers or contractors on the basis of nationality pursuant to provisions in the procurement regulations or other provisions of law, supported also by article 3 on the primacy of international obligations of the enacting State, also permits the Model Law to take account of cases in which the funds being used are derived from a bilateral tied-aid arrangement. Such an arrangement would require that procurement with the funds should be from suppliers and contractors in the donor country. Similarly, recognition is thereby given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from economic sanctions imposed by the United Nations Security Council.

26. It may be noted that the Model Law provides in article 34(4)(d) and 39(2) for the use of the technique referred to as the "margin of preference" in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports.

27. Aside from cases of domestic procurement that result from requirements of law referred to above in paragraph 25, in which the procuring entity may dispense with the special measures in the Model Law designed to facilitate international participation, the Model Law also permits the procuring entity engaging in tendering proceedings or using the principal method for procurement of services to forgo those procedures in the case of low-value procurement in which there is unlikely to be interest on the part of foreign suppliers or contractors. At the same time, the Model Law recognizes that in such cases of low-value procurement the procuring entity would not have any legal or economic interest in precluding the participation of foreign suppliers and contractors, since a blanket exclusion of foreign

suppliers and contractors in such cases might unnecessarily deprive it of the possibility of obtaining a better price. It may be noted that for the purposes of determining what is a low-value procurement contract, the threshold level as regards procurement of goods and construction might be higher than that for procurement of services.

G. Prior-approval requirement for use of exceptional procedures

28. The Model Law provides that certain important actions and decisions by the procuring entity, in particular those involving the use of exceptional procedures (e.g., use of a procurement method other than tendering for the procurement of goods and construction or, in the case of services, a method other than the principal method for procurement of services or other than tendering), should be subject to prior approval by a higher authority. The advantage of a prior-approval system is that it fosters the detection of errors and problems before certain actions and final decisions are taken. In addition, it may provide an added measure of uniformity in a national procurement system, particularly where the enacting State has an otherwise decentralized procurement system. However, the prior-approval requirement is presented in the Model Law as an option. This is because a prior-approval system is not traditionally applied in all countries, in particular where control over the procurement practices is exercised primarily through audit.

29. The references in the Model Law to approval requirements leave it up to the enacting State to designate the organ or organs responsible for issuing the various approvals. The authority exercised as well as the organ exercising the approval function may differ. An approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, States may find it preferable for the approval function to be exercised by an organ or authority that is part of the governmental or administrative apparatus in order to ensure that the public policies sought to be advanced by the Model Law are given due effect. In any case, it is important that the organ or authority be able to exercise its functions impartially and effectively and be sufficiently independent of the persons or department involved in the procurement proceedings. It may be preferable for the approval function to be exercised by a committee of persons, rather than by one single person.

H. Review procedures

30. An important safeguard of proper adherence to procurement rules is that suppliers and contractors have the right to seek review of actions by the procuring entity in violation of those rules. Such a review process, which is set forth in chapter VI, helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for review to suppliers and contractors, who have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law.

31. The Model Law recognizes that, because of considerations relating to the nature and structure of legal systems and systems of administration, which are closely linked to the

question of review of governmental actions, States might, to one degree or another, see fit to adapt the articles in chapter VI in line with those considerations. Because of this special circumstance, the provisions on review are of a more skeletal nature than other portions of the Model Law. What is crucial is that, whatever the exact form of review procedures, an adequate opportunity and effective procedures for review should be provided. Furthermore, it is recognized that the articles in the Model Law on review may be used by the enacting State merely to measure the adequacy of existing review procedures.

32. As to their content, the provisions establish in the first place that suppliers and contractors have a right to seek review. In the first instance, that review is to be sought from the procuring entity itself, in particular where the procurement contract is yet to be awarded. That initial step has been included so as to facilitate economy and efficiency, since in many cases, in particular prior to the awarding of the procurement contract, the procuring entity may be quite willing to correct procedural errors, of which it may even not have been aware. The Model Law also provides for review by higher administrative organs of Government, where such a procedure would be consistent with constitutional, administrative and judicial structures. Finally, the Model Law affirms the right to judicial review, but does not go beyond that to address matters of judicial-procedure law, which are left to the applicable national law.

33. In order to strike a workable balance between, on the one hand, the need to preserve the rights of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process, chapter V includes a number of restrictions on the review procedures that it establishes. These include: limitation of the right to review under the Model Law to suppliers and contractors; time limits for filing of applications for review and for disposition of cases, including any suspension of the procurement proceedings that may apply at the level of administrative review; exclusion from the review procedures of a number of decisions that are left to the discretion of the procuring entity and that do not directly involve questions of the fairness of treatment accorded suppliers and contractors (e.g., selection of a method of procurement; the limitation of participation in procurement proceedings on the basis of nationality in accordance with article 8).

I. Record requirement

34. One of the principal mechanisms for promoting adherence to the procedures set forth in the Model Law and for facilitating the accountability of the procuring entity to supervisory bodies in Government, to suppliers and contractors, and to the public at large is the requirement set forth in article 11 that the procuring entity maintain a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. Article 11 provides rules as to which specific actions and decisions are to be reflected in the record. It also establishes rules as to which portions of the record are, at least under the Model Law, to be made available to the general public, and which portions of the record are to be disclosed only to suppliers and contractors.

J. Other provisions

35. The Model Law also includes a variety of other provisions designed to support the objectives and procedures of the Model Law. These include provisions on: public accessibility of laws and regulations relating to procurement; form of communications between the procuring entity and suppliers and contractors; documentary evidence provided by suppliers and contractors concerning their qualifications; public notification of procurement-contract awards; mandatory rejection of a tender or offer in case of improper inducements from suppliers and contractors; manner of formulating specifications for goods or construction to be procured; language of documents for solicitation of tenders, proposals, offers or quotations; procedures to be followed in the various procurement methods available under the Model Law (e.g., for tendering proceedings: provision on contents of solicitation documents; tender securities; opening of tenders; examination, evaluation and comparison of tenders; rejection of all tenders; and entry into force of the procurement contract).

K. Proper administrative structure for implementation of the Model Law

36. The Model Law sets forth only the procedures to be followed in selecting the supplier or contractor with whom the contract will be concluded. The Model Law assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law.

37. In addition to designating the organ or authority to perform the approval function referred to above in paragraphs 28 and 29, an enacting State may find it desirable to provide for the overall supervision of and control over procurement to which the Model Law applies. An enacting State may vest all of those functions in a single organ or authority (e.g., ministry of finance or of commerce, or central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned here:

(a) Supervising overall implementation of procurement law and regulations. This may include, for example, issuance of procurement regulations, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws. In some cases, e.g., in the case of high-value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the contract can enter into existence.

(b) Rationalization and standardization of procurement and of procurement practices. This may include, for example, co-ordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader Government policies. This may include, for example, examining the impact of procurement on the national economy, rendering advice on the effect of particular procurement on prices and other economic factors,

and verifying that a particular procurement falls within the programmes and policies of the Government. The organ or authority may be charged with issuance of approvals for particular procurement prior to the commencement of the procurement proceedings.

(d) Training of procurement officers. The organ or authority could also be responsible for training the procurement officers and other civil servants involved in operating the procurement system.

38. The organ or authority to exercise administrative and oversight functions in a particular enacting State, and the precise functions that the organ or authority is to exercise, will depend, for example, on the governmental, administrative and legal systems in the State, which vary widely from country to country. The system of administrative control over procurement should be structured with the objectives of economy and efficiency in mind, since systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively.

39. It may be noted that a State enacting the Model Law does not thereby commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased Government expenditures.

40. It may be noted that a variety of the institutional, staff development and training, and policy issues affecting public procurement, in particular in developing countries, are discussed in Improving Public Procurement Systems, Guide No. 23 issued by the International Trade Centre UNCTAD/GATT (Geneva).

L. Assistance from UNCITRAL Secretariat

41. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

42. Further information concerning the Model Law, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch
Office of Legal Affairs, United Nations
Vienna International Centre, P. O. Box 500
A-1400, Vienna, Austria
Telex: 135612 uno a
Fax: (43-1) 237-485
Phone: (43-1) 21131-4060

II. ARTICLE-BY-ARTICLE REMARKS

PREAMBLE

The reason for including in the Model Law a statement of objectives is to provide guidance in the interpretation and application of the Model Law. Such a statement of objectives does not itself create substantive rights or obligations for procuring entities or for contractors or suppliers. It is recommended that, in States in which it is not the practice to include preambles, the statement of objectives should be incorporated in the body of the provisions of the Law.

* * *

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all types of procurement, but at the same time to recognize that an enacting State may wish to exempt certain types of procurement from coverage. The provision limits exclusions of the Model Law to cases provided for either by the Law itself or by regulation. This is done so that exclusions would not be made in a secretive or informal manner. In order to expand as far as possible the application of the Model Law, article 1(2) provides for complete or partial application of the Model Law even to excluded sectors. It may be further noted that, despite the exclusion in article 1(2)(a) of procurement involving national defence or security, it is not the intent of the Model Law to suggest that an enacting State that was prepared as a general rule to apply the Model Law to such procurement should not do so.

2. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of the procurement regulations, since such exclusions by means of administrative rather than legislative action may be seen as negatively affecting the objectives of the Model Law. Furthermore, the broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in procurement may make it less necessary to exclude the procedures provided in the Model Law. States excluding the application of the Model Law by way of procurement regulations should take note of article 5.

* * *

Article 2. Definitions

1. The Model Law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from State to State due to differences in the allocation of legislative competence among different levels of Government. Accordingly, subparagraph (b)(i), defining the term "procuring entity", presents options as to the levels of Government to be covered. Option I brings within the scope of the Model Law all governmental departments, agencies, organs

and other units within the enacting State, pertaining to the central Government as well as to provincial, local or other governmental subdivisions of the enacting State. This Option would be adopted by non-federal States, and by federal States that could legislate for their subdivisions. Option II would be adopted by States that enact the Model Law only with respect to organs of the national Government.

2. In subparagraph (b)(ii), the enacting State may extend application of the Model Law to certain entities or enterprises that are not considered part of the Government, if it has an interest in requiring those entities to conduct procurement in accordance with the Model Law. In deciding which, if any, entities to cover, the enacting State may consider factors such as the following:

(a) whether the Government provides substantial public funds to the entity, provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise supports the obligations of the procuring entity under the contract;

(b) whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(d) whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(e) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(f) whether the entity has been created by special legislative action in order to perform activities in the furtherance of a legally-mandated public purpose and whether the public law applicable to Government contracts applies to procurement contracts entered into by the entity.

3. Editorial language has been included at the end of the definitions of "goods" and of "services" in subparagraphs (c) and (e) indicating that a State may wish to refer specifically in those definitions to categories of items that would be treated as goods or services, as the case may be, and whose classification might otherwise be unclear. The intent of this technique is to provide clarity with respect to what is and what is not to be treated as "goods" or "services" and it is therefore not meant to be used to limit the scope of application of the Model Law, which can be done by way of article 1(2)(b). Such an added degree of specificity might be considered desirable by the enacting State, in particular in view of the open-ended definition of services. For example, the enacting state may wish to specify the definition under which printing would fall, or the classification of other items, such as real estate, that might be made subject to the procurement law but whose classification would not be readily apparent.

* * *

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

1. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the GATT Agreement on Government Procurement, and the members of the European Union are bound by directives on procurement applicable throughout the geographic region. Similarly, the members of regional economic groupings in other parts of the world may be subject to procurement directives applied by their regional groupings. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to the respective guidelines or rules. The purpose of subparagraphs (a) and (b) is to provide that the requirements of the international agreement, or other international obligation at the intergovernmental level, are to be applied; but in all other respects the procurement is to be governed by the Model Law.

2. Optional subparagraph (c) permits a federal State enacting the Model Law to give precedence over the Model Law to intergovernmental agreements concerning matters covered by the Model Law concluded between the national Government and one or more subdivisions of the State, or between any two or more such subdivisions. Such a clause might be used in enacting States in which the national Government does not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law.

* * *

Article 4. Procurement regulations

1. As noted in paragraphs 7 and 12 of section I of the Guide, the Model Law is a "framework law", setting forth basic legal rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate organ or authority of the enacting State. The "framework law" technique enables an enacting State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law. Thus, various provisions of the Model Law expressly provide for supplementation by procurement regulations. Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the regulations should be consistent with the Model Law.

2. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: application of the Model Law to excluded sectors (article 1(2)); prequalification proceedings (article 7(3)(e)); the manner of publication of the notice of procurement-contract awards (article 14); limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to the quantity that is required to deal with the urgent circumstances); details concerning the procedures for soliciting tenders or applications to prequalify (article 24); requirements relating to the preparation and submission of tenders (article 27(z)); and, in procurement of services, rules to guard against conflicts of interest in a determination to use single source procurement for reasons of compatibility with previous services.

3. In some cases failure to issue procurement regulations when the regulations are referred to in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings on the ground of nationality (article 8(1)); use of the request-for-quotations method of procurement, since that method may be used only below threshold levels set in the procurement regulations (article 21); and authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 34(4)(d) and 39(2)).

* * *

Article 5. Public accessibility of legal texts

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be considered important not only in States in which such a requirement is not already found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.

2. In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign suppliers and contractors, in another appropriate manner.

* * *

Article 6. Qualifications of suppliers and contractors

The function and broad outlines of article 6 have been noted in paragraph 23 of section I of the Guide. Paragraph (1)(b)(v) of article 6 refers to disqualification of suppliers and contractors pursuant to administrative suspension or disbarment proceedings. Such administrative proceedings -- in which alleged wrongdoers should be given some procedural rights such as an opportunity to disprove the charges -- are commonly used to suspend or disbar suppliers and contractors found guilty of wrongdoing such as faulty accounting, default in contractual performance, or fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (1)(b)(v) should disqualify a supplier or contractor from being considered for a procurement contract.

* * *

Article 7. Prequalification proceedings

1. Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers or contractors that are not suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but involve a very specialized nature. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time-consuming. The use of prequalification proceedings may narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the tender, proposal or offer may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders, proposals or offers submitted by unqualified or disreputable suppliers or contractors.

2. The prequalification procedures set forth in article 7 are made subject to a number of important safeguards. These safeguards include the subjugation of prequalification procedures to the limitations contained in article 6, in particular as to assessment of qualifications, and the procedures found in paragraphs (2) through (7) of article 7. This set of procedural safeguards is included to ensure that prequalification procedures are conducted only on non-discriminatory terms and conditions that are fully disclosed to participating suppliers or contractors, and that otherwise ensure at least a required minimum level of transparency and facilitate the exercise by a supplier or contractor that has not been prequalified of its right to review.

3. The purpose of article 7(8) is to provide for reconfirmation, at a later stage of the procurement proceedings, of the qualifications of suppliers or contractors that had been prequalified. Such "post-qualification proceedings" are intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification remains valid and accurate. The procedural requirements for post-qualification are designed to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors.

* * *

Article 8. Participation by suppliers or contractors

As noted in paragraphs 24 to 27 of section I of the Guide, making provision for international procurement proceedings has important advantages. Therein is found a description of the general approach and rationale of the provisions in the Model Law on international participation of suppliers and contractors in procurement proceedings, including the manner in which the general principle of international participation may be limited to take into account differing applicable legal obligations and the margin of preference in favour of local suppliers and contractors.

* * *

Article 9. Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement, subject to other provisions of the Model Law, is that a communication must be in a form that provides a record of its content. This approach is designed not to tie communication to the use of paper, taking into account that communications are increasingly carried out through means such as electronic data interchange ("EDI"). In view in particular of the as yet uneven availability and use of non-traditional means of communication such as EDI, paragraph (3) has been included as a safeguard against discrimination against or among suppliers and contractors on the basis of the form of communication that they use.

2. Obviously, article 9 does not purport to answer all the technical and legal questions that may be raised by the use of EDI or other non-traditional methods of communication in the context of procurement proceedings, and different areas of the law would apply to ancillary questions such as the electronic issuance of a tender security and other matters that are beyond the sphere of "communications" under the Model Law.

3. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the confirming communication.

* * *

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

1. In order to facilitate participation by foreign suppliers and contractors, article 10 bars the imposition of any requirements as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by contractors and suppliers are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

2. It may be noted that the expression "the laws of this State" is meant to refer not only to the statutes, but also to the implementing regulations as well as to the treaty obligations of the enacting State. In some States such a general reference to "laws" would suffice to indicate that all of the above-mentioned sources of law were being referred to. However, in other States a more detailed reference to the various sources of law would be warranted in order to make it clear that reference was being made not merely to statutes.

* * *

Article 11. Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds. The rationale behind limiting disclosure of information required to be disclosed under article 11 (1)(d) to that which is known to the procuring entity is that there may be procurement proceedings in which not all proposals would be fully developed or finalized by the proponents, in particular where some of the proposals did not survive to the final stages of the procurement proceedings. The reference in this paragraph to "a basis for determining the price" is meant to reflect the possibility that in some instances, particularly in procurement of services, the tenders, proposals, offers or quotations would contain a formula by which the price could be determined rather than an actual price quotation.

2. An aspect of enacting record requirements is to specify the extent and the recipients of the disclosure. Setting the parameters of disclosure involves balancing factors such as: the general desirability, from the standpoint of the accountability of procuring entities, of broad disclosure; the need to provide suppliers and contractors with information necessary to permit them to assess their performance in the proceedings and to detect instances in which there are legitimate grounds for seeking review; and the need to protect the confidential trade information of suppliers and contractors. In view of these considerations, article 11 provides two levels of disclosure. It mandates disclosure to any member of the general public of the information referred to in article 11(1)(a) and (b) -- basic information geared to the accountability of the procuring entity to the general public. Disclosure of more detailed information concerning the conduct of the procurement proceedings is mandated for the benefit of suppliers and contractors, since that information is necessary to enable them to monitor their relative performance in the procurement proceedings and to monitor the conduct of the procuring entity in implementing the requirements of the Model Law.

3. As mentioned above, among the necessary objectives of disclosure provisions is to avoid the disclosure of confidential trade information of suppliers and contractors. That is true in particular with respect to what is disclosed concerning the evaluation and comparison of tenders, proposals, offers and quotations, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of suppliers and contractors. Accordingly, the information referred to in paragraph (1)(e) involves only a summary of the evaluation and comparison of tenders, proposals, offers or quotations, while paragraph (3)(b) restricts the disclosure of more detailed information that exceeds what would be disclosed in such a summary.

4. The purpose of requiring disclosure to the suppliers or contractors at the time when the decision is made to accept a particular tender, proposal or offer is to give efficacy to the right to review under article 42. Delaying disclosure until entry into force of the

procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy.

5. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to Government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the enacting State.

* * *

Article 12. Rejection of all tenders, proposals, offers or quotations

1. The purpose of article 12 is to enable the procuring entity to reject all tenders, proposals, offers or quotations. Inclusion of this provision is important because a procuring entity may need to do so for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the goods, construction or services ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice.

2. The requirement in paragraph (3) that notice of the rejection of all tenders, proposals, offers or quotations be given to suppliers or contractors that submitted them, together with the requirement in paragraph (1) that the grounds for the rejection be communicated upon request to those suppliers or contractors, is designed to foster transparency and accountability. Paragraph (1) does not require the procuring entity to justify the grounds that it cites for the rejection. This approach is based on the premise that the procuring entity should be free to abandon the procurement proceedings on economic, social or political grounds which it need not justify. The protection of this power is further buttressed by the fact that the decision of the procuring entity to reject all tenders, proposals, offers or quotations is not subject, in accordance with article 52(2)(c), to the right to review provided by the Model Law; it is also supported by paragraph (2), which provides that the procuring entity is to incur no liability towards suppliers or contractors, such as compensation for their costs of preparing and submitting tenders, proposals, offers or quotations, solely by virtue of its invoking paragraph (1). The potentially harsh effects of article 12 are mitigated by permitting the procuring entity to reject all tenders, proposals, offers or quotations only if the right to do so has been reserved in the solicitation documents.

* * *

Article 13. Entry into force of the procurement contract

Article 13 is included because, from the standpoint of transparency, it is important for suppliers and contractors to know in advance the manner of entry into force of the procurement contract. In the context of tendering, article 37 sets forth detailed rules applicable to the entry into force of the procurement contract, which is reflected in paragraph (1). However, no rules on entry into force of the procurement contract are provided for the

other methods of procurement in view of the varying circumstances that may surround the use of other procurement methods and the procedurally less detailed treatment of them in the Model Law. It is expected that, in most instances, entry into force of the procurement contract for the other methods of procurement will be determined in accordance with other bodies of law, such as the contract or administrative law of the enacting State. In order to ensure an adequate degree of transparency, however, it is provided for those other methods that the procuring entity predisclose to the suppliers and contractors the rules that will be applicable to the entry into force of the procurement contract.

* * *

Article 14. Public notice of procurement contract awards

1. In order to promote transparency in the procurement process, and the accountability of the procuring entity to the public at large for its use of public funds, article 14 requires publication of a notice of award of the procurement contract. This obligation is separate from the notice of award required to be given pursuant to article 36(6) to suppliers and contractors that have participated in tendering proceedings, and independent from the requirement that information of that nature in the record should be made available to the general public under article 11(2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which paragraph (2) suggests may be dealt with in the procurement regulations.

2. In order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts no matter how low their value, the enacting State is given the option in paragraph (3) of setting a monetary-value threshold below which the publication requirement would not apply. However, since the monetary-value threshold might be subject to periodic changes, for example, due to inflation, it might be preferable to set out the threshold in the procurement regulations, the amendment of which would presumably be less complicated than an amendment of the statute.

* * *

Article 15. Inducements from suppliers or contractors

1. Article 15 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to eradicate completely such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.

2. To guard against abusive application of article 15, rejection is made subject to approval, to a record requirement and to a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

* * *

Article 16. Rules concerning description of goods, construction or services

The purpose of including article 16 is to make clear the importance of the principle of clarity, completeness and objectivity in the description of the goods, construction or services to be procured in prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate tenders, proposals, offers and quotations that meet the needs of the procuring entity, and enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions in solicitation documents enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. Furthermore, application of the rule that specifications should be written so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be filled by a greater number of suppliers or contractors, thereby facilitating the use of as competitive a method of procurement as is feasible under the circumstances and in particular helping to limit abusive resort to single-source procurement.

* * *

Article 17. Language

1. The function of the bracketed language at the end of the chapeau is to facilitate participation in procurement proceedings by helping to make the prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations understandable to foreign suppliers and contractors. The reference to a language customarily used in international trade need not be adopted by an enacting State whose official language is one customarily used in international trade. Subparagraphs (a) and (b) have been incorporated in order to provide the procuring entity with the flexibility needed to waive application of the foreign language requirement in cases in which participation is restricted to domestic suppliers or contractors and in cases in which, while there is no such restriction imposed, foreign suppliers or contractors are not expected to be interested in participating.

2. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity might also be called upon to make it clear in the solicitation documents that both language versions are of equal weight.

* * *

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 18. Methods of procurement

1. Article 18 establishes the rule, already discussed in paragraph 14 of section I of the Guide, that, for the procurement of goods or construction, tendering is the method of procurement to be used normally, while the principal method for procurement of services, as set out in chapter IV, is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, the Model Law provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering where it is feasible to formulate detailed specifications and the nature of the services allow for tendering (for example, general building management services); furthermore, it may use one of the other methods of procurement available under the Model Law if the conditions for its use are met.

2. Article 18(4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than the principal method for procurement of services, should be supported in the record by a statement of the grounds and circumstances underlying that decision. That requirement is included because the decision to use an exceptional method of procurement, rather than the method that is normally required (i.e., tendering for goods or construction, or the principal method for procurement of services) should not be made secretly or informally.

* * *

Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

1. As noted in paragraph 18 of section I of the Guide, for the circumstances specified in article 19(1), the Model Law provides the enacting State with a choice among three different methods of procurement other than tendering or the principal method for procurement of services -- two-stage tendering, request for proposals, and competitive negotiation. As further noted in paragraph 19 of section I of the Guide, an enacting State need not necessarily enact each of the three methods for the common circumstances referred to in article 19 or even enact more than one of them. An enacting State might decide not to enact more than one of the methods in view of the uncertainty likely to be encountered by procuring entities in trying to discern the most appropriate method from among two or three similar methods. In deciding which of the three methods to enact, a decisive criterion for the enacting State might be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be enacted, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.

2. The enacting State also might decide not to extend to procurement of services the methods of procurement set forth in article 19. The rationale behind such a decision could be a determination that the principal method for procurement of services (chapter IV) already contains procedures that are in many respects similar to the procedures for the methods of procurement set forth in article 19.

3. It may be noted that in the cases referred to in article 19(1)(a), in which it is not feasible for the procuring entity to formulate specifications for the goods or construction or, in the case of services, to identify their characteristics, the procuring entity, before deciding to use a method of procurement other than tendering, might wish to consider whether the specifications could be prepared with the assistance of consultants.

4. Subparagraphs (b) and (c) of article 22 (single-source procurement), referring, respectively, to cases of non-catastrophic and catastrophic urgency, are identical to subparagraphs (a) and (b) of article 19(2), which permit the use of competitive negotiation in such cases of urgency. The purpose of this overlap is to permit the procuring entity to decide which of the two methods best suits the circumstances at hand. For both procurement methods, the urgency cases contemplated are intended to be truly exceptional, and not merely cases of convenience. In the application of the Model Law to procurement involving national defence or national security and in cases of research contracts for the procurement of a prototype, the procuring entity is, for similar reasons, given a choice between the methods of procurement provided for in article 19 and single-source procurement. Thus, an enacting State may, even if it does not enact competitive negotiation for the circumstances referred to in paragraph (1), enact competitive negotiation for the circumstances referred to in paragraph (2).

* * *

Article 20. Conditions for use of restricted tendering

1. Article 20 has been included in order to enable the procuring entity, in exceptional cases, to solicit participation only from a limited number of suppliers or contractors. Inclusion of this method in the Model Law is not intended to encourage its use. On the contrary, strict and narrow conditions for use have been included for restricted tendering since the unjustified resort to that method of procurement would impair fundamentally the objectives of the Model Law.

2. In order to give effect to the purpose of article 20 to limit the use of restrictive tendering to truly exceptional cases while maintaining the appropriate degree of competition, minimum solicitation requirements are set forth in article 47(1) that are tailored specifically to each of the two types of cases reflected in the conditions for use in article 20. When resort is made to restricted tendering on the ground, referred to in article 20(a), of a limited number of suppliers or contractors being available, all the suppliers or contractors that could provide the goods, construction or services are required to be invited to participate; when the ground is the low value of the procurement contract, the case referred to in article 20(b), suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition.

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Article 21. Conditions for use of request for quotations

1. The request-for-quotations method of procurement provides a method of procurement appropriate for low-value purchases of standardized goods or services. In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 21(2), however, strictly limits the use of this method to procurement of a value below the threshold set in the procurement regulations. In enacting article 21, it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. It may indeed be advisable in certain cases that fall below the threshold to use tendering or one of the other methods of procurement. This may be the case, for example, when an initial low-value procurement would have the long- term consequence of committing the procuring entity to a particular type of technological system.

2. Paragraph (2) gives added and important effect to the intended limited scope for the use of request for quotations. It does so by prohibiting the artificial division of packages of goods or services for the purpose of circumventing the value limit on the use of request for quotations with a view to avoiding use of the more competitive methods of procurement, a prohibition that is essential to the objectives of the Model Law.

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Article 22. Conditions for use of single-source procurement

1. In view of the non-competitive character of single-source procurement, its use is strictly limited to the exceptional circumstances set forth in article 22.

2. Paragraph (2) has been included in order to permit the use of single-source procurement in cases of serious economic emergency in which such procurement would avert serious harm. A case of this type may be, for example, where an enterprise employing most of the labor force in a particular region or city is threatened with closure unless it obtains a procurement contract.

3. Paragraph (2) contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement. As regards the approval requirement mentioned in paragraph (2), it may be noted that enacting States that incorporate the over-all approval requirement for the use of single-source procurement might not necessarily have to incorporate the approval requirement referred to in paragraph (2). At the same time, however, it would have to be recognized that the decision to use single-source procurement in the economic emergency type of circumstance referred to would and should ordinarily be taken at the highest levels of Government.

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CHAPTER III. TENDERING PROCEEDINGS

SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 23. Domestic tendering

As pointed out in paragraph 27 of section I of the Guide, article 23 has been included in order to specify the exceptional cases in which application of various procedures in the Model Law to solicit foreign participation in the tendering proceedings would not be required.

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Article 24. Procedures for soliciting tenders or applications to prequalify

1. In order to promote transparency and competition, article 24 sets forth the minimum publicity procedures to be followed for soliciting tenders and applications to prequalify from an audience wide enough to provide an effective level of competition. Including these procedures in the procurement law enables interested suppliers and contractors to identify, simply by reading the procurement law, publications they may monitor in order to stay abreast of procurement opportunities in the enacting State. In view of the objective of the Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 24(2) requires publication of the invitations also in a publication of international circulation. One possible medium of such publication is Development Business, published by the United Nations Department of Public Information.

2. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender or the invitation to prequalify by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity.

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Article 25. Contents of invitation to tender and invitation to prequalify

In order to promote efficiency and transparency, article 25 requires that invitations to tender as well as invitations to prequalify contain the information required for suppliers or contractors to be able to ascertain whether the goods, construction or services being procured are of a type that they can provide and, if so, how they can participate in the tendering proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

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Article 26. Provision of solicitation documents

Solicitation documents are intended to provide suppliers or contractors with the information they need to prepare their tenders and to inform them of the rules and procedures according to which the tendering proceedings will be conducted. Article 26 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the tendering proceedings and that comply with the procedures set forth by the procuring entity are provided with solicitation documents. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in the tendering proceedings.

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Article 27. Contents of solicitation documents

1. Article 27 contains a listing of the information required to be included in the solicitation documents. An indication in the procurement law of those requirements is useful to ensure that the solicitation documents include the information necessary to provide a basis for enabling suppliers and contractors to submit tenders that meet the needs of the procuring entity and that the procuring entity can compare in an objective and fair manner. Many of the items listed in article 27 are regulated or dealt with in other provisions of the Model Law. The enumeration in this article of items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a "check-list" in preparing the solicitation documents.

2. One category of items listed in article 27 concerns instructions for preparing and submitting tenders (subparagraphs (a), (i) through (r), and (t); issues such as the form, and manner of signature, of tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers or contractors would be placed at a disadvantage or even rejected due to lack of clarity as to how the tenders should be prepared. Other items in article 27 concern in particular the manner in which the tenders will be evaluated; their disclosure is required to achieve transparency and fairness in the tendering proceedings.

3. The Model Law recognizes that, for procurement actions that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers or contractors to submit tenders either for the entirety of the procurement or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by smaller suppliers or contractors, who may have the capacity to submit tenders only for certain portions of the procurement. Article 27(h) is included to make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring

entity should not be permitted to divide the entirety of the procurement into separate contracts merely as it sees fit after tenders are submitted.

* * *

Article 28. Clarifications and modifications of solicitation documents

1. The purpose of article 28 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster efficient, fair and successful conduct of tendering proceedings. The right of the procuring entity to modify the solicitation documents is important in order to enable the procuring entity to obtain what is required to meet its needs. Article 28 provides that clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated by the procuring entity to all suppliers or contractors to whom the procuring entity provided solicitation documents. It would not be sufficient to simply permit them to have access to clarifications upon request since they would have no independent way of finding out that a clarification had been made.

2. The rule governing clarifications is meant to ensure that the procuring entity responds to a timely request for clarification in time for the clarification to be taken into account in the preparation and submission of tenders. Prompt communication of clarifications and modifications also enables suppliers or contractors to exercise their right under article 31(3) to modify or withdraw their tenders prior to the deadline for submission of tenders, unless that right has been superseded by a stipulation in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly so that those minutes too can be taken into account in the preparation of tenders.

* * *

SECTION II. SUBMISSION OF TENDERS

Article 29. Language of tenders

Article 29 provides that tenders may be formulated in any language in which the solicitation documents have been formulated or in any other language specified in the solicitation documents. This rule, which is linked to the general language rule in article 17, has been included in order to facilitate participation by foreign suppliers and contractors.

* * *

Article 30. Submission of tenders

1. An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders. Article 30 recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the procurement, the extent of subcontracting anticipated, and the time needed for transmitting tenders. Thus, it is left up to the procuring entity to fix the deadline by which tenders must be submitted, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the

procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders.

2. In order to promote competition and fairness, paragraph (2) requires the procuring entity to extend the deadline in the exceptional case of late issuance of clarifications or modifications of the solicitation documents, or of late issuance of minutes of a meeting of suppliers or contractors. Paragraph (3) permits, but does not compel, the procuring entity to extend the deadline for submission of tenders in other cases, i.e., when one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. It may be noted that an extension of the deadline in the circumstances referred to in paragraph (2) is required rather than discretionary, and would thus be subject to the right to review. By contrast, an extension under paragraph (3) is, as indicated in paragraph (3), absolutely discretionary and therefore intended to be beyond the right to review provided for in article 52.

3. The requirement in paragraph (5)(a) that tenders are to be submitted in writing is subject to the exception in subparagraph (b) permitting the use of a form of communication other than writing, such as electronic data interchange (EDI), provided that the form used is one that provides a record of the content of the communication. Additional safeguards are included to protect the integrity of the procurement proceedings, as well as the particular interests of the procuring entity and of suppliers and contractors: that the use of a form other than writing must be permitted by the solicitation documents; that suppliers and contractors must always be given the right to submit tenders in writing, an important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as EDI; and that the alternative form must be one that provides at least a similar degree of authenticity, security and confidentiality. It may be further noted that the implementation of paragraph (5) to accommodate the submission of tenders in non-traditional forms would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent "opening" of the tenders prior to the deadline for submission of tenders, and to deal with other issues that might arise when a tender is submitted other than in writing (e.g., the form that the tender security would take).

4. The rule in paragraph (6) prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable suppliers or contractors to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other suppliers or contractors. In addition, it could interfere with the orderly and efficient process of opening tenders.

* * *

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

1. Article 31 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders are to remain in effect.

2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable long period of effectiveness hoping to cover the needs of most if not all tendering proceedings. This would be inefficient since for many cases the period would be longer than necessary. Excessively long periods of effectiveness may result in higher tender prices since suppliers or contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., tied capacity and inability to tender elsewhere; the risks of higher manufacturing or construction costs).

3. Paragraph (2)(b) has been included to enable the procuring entity to deal with delays in the tendering proceedings by requesting extensions of the tender validity period. The procedure is not compulsory on suppliers and contractors, so as not to force them to remain bound to their tenders for unexpectedly long durations -- a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order to prolong, where necessary, also the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the tender is considered as having refused to extend the validity period of its tender.

4. Paragraph (3) is an essential companion of the provisions in article 28 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders. However, in order to take account of a contrary approach found in the existing law and practice of some States, paragraph (3) permits the procuring entity to depart from the general rule and to impose forfeiture of the tender security for modifications and withdrawals prior to the deadline for submission of tenders, but only if so stipulated in the solicitation documents. (See also the remarks under article 46.)

* * *

Article 32. Tender securities

1. The procuring entity may suffer losses if suppliers or contractors withdraw tenders or if a procurement contract with the supplier or contractor whose tender had been accepted is not concluded due to the fault of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 32 authorizes the procuring entity to require the suppliers or contractors participating in the tendering proceedings to post a tender security so as to cover such losses and to discourage them from defaulting. Procuring entities are not required to impose tender security requirements in all tendering proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, though it may be of importance to require a tender security in some cases, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security -- which will normally be reflected in the contract price -- will be less justified.

2. Safeguards have been included to ensure that a tender-security requirement is only imposed fairly and for the intended purpose. That purpose is to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the tenders they have submitted and to post a security for performance of the procurement contract, if required to do so.

3. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, there is optional language at the end of paragraph (1)(c) providing flexibility on this point for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law.

4. The reference to confirmation of the tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The reference, however, is not intended to encourage such a practice, in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tendering proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for submission of tenders and added costs for foreign suppliers and contractors).

5. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry. As does article 31(3), paragraph (2)(d) reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for submission of tenders is not subject to forfeiture of the tender security.

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SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 33. Opening of tenders

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of an opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.

2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. This rule contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have submitted tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

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Article 34. Examination, evaluation and comparison of tenders

1. The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Enactment of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.

2. Paragraph (2) sets forth the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive even if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.

3. Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and predictability, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the "lowest evaluated tender", i.e., one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria. The criteria in paragraph (4)(c)(iii) related to economic-development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4)(c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.

4. Requiring that the non-price criteria should be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the solicitation documents. The tender with the most favourable aggregate weighting would be the lowest evaluated tender.

5. Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See paragraph 26 of section I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving competition.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the European Union may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority. Furthermore, the use of the margin of preference is required to be predisclosed in the solicitation documents and reflected in the record of the procurement proceedings.

6. The envisaged procurement regulations setting forth rules concerning the calculation and application of a margin of preference could also establish criteria for qualifying as a "domestic" contractor or supplier and for qualifying goods as "domestically produced" (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for goods and for construction. As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.

7. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity (see article 25(s)).

8. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender upon

failure of the supplier or contractor to reconfirm and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case.

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Article 35. Prohibition of negotiations with suppliers or contractors

Article 35 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by the supplier or contractor. This rule has been included because such negotiations might result in an "auction", in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used or, if they do participate, they raise their tender prices in anticipation of the negotiations.

* * *

Article 36. Acceptance of tender and entry into force of procurement contract

1. The purpose of paragraph (1) is to state clearly the rule that the tender ascertained to be the successful one pursuant to article 34(4)(b) is to be accepted and that notice of the acceptance is to be given promptly to the supplier or contractor that submitted the tender. Absent the provision in paragraph (4) on entry into force of the procurement contract, the entry into force of the procurement contract would be governed by general legal rules, which in many cases might not provide solutions appropriate for the procurement context.

2. The Model Law provides for different methods of entry into force of the procurement contract in the context of tendering proceedings, in recognition that enacting States may differ as to the preferred method and that, even within a single enacting State, different entry-into-force methods may be employed in different circumstances. Depending upon its preferences and traditions, an enacting State may wish to incorporate one or more of these methods.

3. Under one method (set forth in paragraph (4)), absent a contrary indication in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender. The second method (set forth in paragraph (2)), ties the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. Paragraph (2) contains an optional reference to "the requesting ministry" as a signatory to the procurement contract in order to take into account that in some States the procurement contract is signed on behalf of the Government by the ministry for whose use the goods, construction or services were destined, but which did not itself conduct the procurement proceedings nor act as the procuring entity within the meaning of the Model Law. In States with such a procurement practice, procurement proceedings may be conducted by a central entity such as a central procurement or tendering board.

4. A third method of entry into force (set forth in paragraph (3)), provides for entry into force upon approval of the procurement contract by a higher authority. In States in which this provision is enacted, further details may be provided in the procurement regulations as to the type of circumstances in which the approval would be required (e.g., only for procurement contracts above a specified value). The reference in paragraph (3) to stipulation of the approval requirement in the solicitation documents is included to give a clear statement of the role of the solicitation documents in giving notice to suppliers or contractors of formalities required for entry into force of the procurement contract. The requirement that the solicitation documents disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the estimated time should not be deemed to extend the validity period of the successful tender or of any tender security are designed to establish a balance taking into account the rights and obligations of suppliers and contractors. They are designed in particular to exclude the possibility that a selected supplier or contractor would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract.

5. The rationale behind linking entry into force of the procurement contract to dispatch rather than to receipt of the notice of acceptance is that the former approach is more appropriate to the particular circumstances of tendering proceedings. In order to bind the supplier or contractor to a procurement contract, including to obligate it to sign any written procurement contract, the procuring entity has to give notice of acceptance while the tender is in force. Under the "receipt" approach, if the notice was properly transmitted, but the transmission was delayed, lost or misdirected owing to no fault of the procuring entity, so that the notice was not received before the expiry of the period of effectiveness of the tender, the procuring entity would lose its right to bind the supplier or contractor. Under the "dispatch" approach, that right of the procuring entity is preserved. In the event of a delay, loss or misdirection of the notice, the supplier or contractor might not learn before the expiration of the validity period of its tender that the tender had been accepted; but in most cases that consequence would be less severe than the loss of the right of the procuring entity to bind the supplier or contractor.

6. In order to promote the objectives of good procurement practice, paragraph (5) makes it clear that, in the event that the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract in accordance with paragraph (2), the selection of another tender from among the remaining tenders must be in accordance with the provisions normally applicable to the selection of tenders, subject to the right of the procuring entity to reject all tenders.

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CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

This Chapter presents the procurement method normally to be used in procurement of services. Since, as noted in paragraph 11 of section I of the Guide, the main difference between procurement of goods and construction and procurement of services is in the evaluation and selection process, the features of chapter IV that differ most markedly from tendering are to be found in articles 42, 43 and 44 on the selection procedures. Otherwise,

the articles in this chapter, for example on solicitation of proposals and on contents of the request for proposals, generally parallel provisions on analogous points in chapter III, on tendering proceedings. This is because tendering and the principal method for procurement of services are the methods to be used in the bulk of procurement and, as such, are designed to maximize economy and efficiency in procurement and promote the other objectives set forth in the Preamble.

* * *

Article 37. Notice of solicitation of proposals

1. In line with the objective of the Model Law of fostering competition in procurement, and since the principal method for procurement of services is the one typically to be used, article 37 is aimed at ensuring that as many suppliers and contractors as possible get the opportunity to become aware of the procurement proceedings and to express their interest in participating. As is the case also in tendering proceedings, this is achieved by providing that the notice seeking expressions of interest should be publicized widely.

2. However, recognizing that in certain instances generally parallel to those reflected in the conditions for use of restricted tendering (article 20), the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (3) sets out those cases where the procuring entity may engage in direct solicitation. The enacting State may wish to establish in the procurement regulations the value threshold below which procuring entities need not, in accordance with paragraphs (2) and (3) of the article, resort to open solicitation. The level at which the threshold would be set for services might be lower than the level at which it would be set for goods and construction. In deciding to engage in direct solicitation, the procuring entity should give consideration as to whether it will reject any unsolicited proposals or as to the manner in which it would consider any such proposals.

* * *

Article 38. Contents of requests for proposals for services

1. Article 38 contains a list of the minimum information that should be contained in the request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. In view of the predominant role of the principal method for procurement of services, article 38 is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 27).

2. Paragraphs (g) and (h) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since, as discussed in paragraph 11 of section I of the Guide, the proposal price might not always be a relevant criterion in the procurement of services, paragraphs (j) and (k) are only applicable if price is a relevant criterion in the selection process.

* * *

Article 39. Criteria for the evaluation of proposals

1. Article 39 sets out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. As is the case elsewhere in the Model Law where such types of criteria are listed, for example, article 48(3), the procuring entity is not required necessarily to apply each of the criteria in every instance of procurement. In the interests of transparency, however, the procuring entity is to apply the same criteria to all proposals in a given procurement proceeding and it is precluded from applying criteria that have not been predisclosed to the suppliers or contractors in the request for proposals.

2. In reflecting the importance of the skill and expertise of the suppliers and contractors in the bulk of the cases of procurement of services, paragraph (1)(a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that require a high degree of personal skill and knowledge on the part of the service providers, for example, in an engineering consultancy contract. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal.

3. Paragraphs (1) (d) and (e), and (2), are similar to provisions applicable to tendering by way of article 34(4)(c)(iii) and (iv), and (d). The comments in the Guide on those provisions in the context of tendering (see paragraphs 3 to 6 of the comments on article 34) are therefore relevant to article 39.

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Article 40. Clarification and modification of requests for proposals

Article 40 mirrors the provisions of article 20 on the analogous matter in the context of tendering and the comments in the Guide on article 20 are thus relevant to article 40.

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Article 41. Choice of selection procedure

1. In articles 42, 43 and 44, three procedures for selecting the successful proposal are provided so as to enable the procuring entity, within the context of a proceeding under chapter IV, to utilize a procedure that best suits the particular requirements and circumstances of each given case. The choice of a particular selection procedure is largely dependent on the type of service being procured and the main factors that will be taken into account in the selection process, in particular, whether the procuring entity wishes to hold negotiations with suppliers and contractors, and if so, at which stage in the selection process. For example, if the services to be procured are of fairly standard nature where no great personal skill and expertise is required, the procuring entity may wish to resort to the selection procedure under article 42, which is more price oriented and which, like tendering,

does not involve negotiations. On the other hand, in particular for services of a complex nature in which the personal skill and expertise of the supplier or contractor is a crucial consideration, the procuring entity may wish to resort to one of the procedures in articles 43 or 44, since they permit greater emphasis to be placed on those selection criteria and provide for negotiation.

2. Paragraph (1)(c) makes allowance for the use of an external and impartial panel of experts in the selection process, a procedure that is sometimes used by procuring entities, particularly in the adjudication of design contests or in procurement of services with a high artistic or aesthetic content. Enacting States using such panels may wish to provide further rules in the procurement regulations, with regard, for example, to any distinctions that would have to be drawn between panels whose role was merely advisory, panels whose role was limited to the aesthetic and artistic aspects of the proposals and panels empowered to make decisions that would bind the procuring entity.

* * *

Article 42. Selection procedure without negotiation

As mentioned above, the procedure provided for under this article may be more compatible with the procurement of services that are of a relatively non-complex nature where the price rather than the personal skill and expertise of the suppliers or contractors is the dominant consideration and the procuring entity does not wish to negotiate. However, to ensure that the suppliers and contractors possess sufficient competence and expertise to perform the procurement contract, the Model Law provides that the procuring entity should establish a threshold level by which to measure the non-price aspects of the proposals. If this threshold is set at a sufficiently high level, then all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability provide the services at a more or less equivalent level of competence. This allows the procuring entity to be more secure in selecting the winning proposal on the basis of price alone in accordance with paragraph (2)(a), or, in accordance with paragraph (2)(b), on the basis of the best combined evaluation of price and non-price aspects.

* * *

Article 43. Selection procedure with simultaneous negotiations

Article 43 sets forth a selection procedure that is akin to the evaluation procedures for the request for proposals method under article 48. It is therefore best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers or contractors, the procuring entity is able to clarify better what its needs are, which can be taken into account by suppliers or contractors when preparing their "best and final offers". Subparagraph (c) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal, including the evaluation of the competence of those who will be involved in providing the services.

* * *

Article 44. Selection procedure with consecutive negotiations

A third procedure for selecting the successful proposal, one that also involves negotiations, and which traditionally has been widely used in particular in procurement of intellectual services, is set forth in paragraph (4). In this procedure, the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors, one at a time, starting with the supplier or contractor that was ranked highest in the procurement, proceeding on the basis of their ranking until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. The rationale for not providing the procuring entity with the ability to reopen negotiations with suppliers or contractors with whom it had already terminated negotiations is to avoid open-ended negotiations which could lead to abuse and cause unnecessary delay. However, although this has the benefit of imposing a measure of discipline in the procurement, it denies the procuring entity the opportunity to reconsider a proposal that subsequent negotiations with suppliers or contractors at a later stage would show to have been more favourable. Nevertheless, the procuring entity may find such a negotiation procedure, although it does not emphasize price competition, appealing in some cases, such as the procurement of architectural and engineering services where considerations of technical quality are particularly important.

* * *

Article 45. Confidentiality

Article 45 is included because, in order to prevent abuse of the selection procedures and to promote confidence in the procurement process, it is important that confidentiality be observed by all parties, especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that suppliers or contractors might include in their proposals and that they would not wish to be made known to their competitors.

* * *

CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT

1. Articles 46 to 51 present procedures to be used for the methods of procurement other than tendering or other than the principal method for procurement of services. As noted in paragraphs 18 and 19 of section I of the Guide, as well as in comment 1 on article 19, there is an overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation, and enacting States might not wish to enact in their procurement laws each of those three methods. The decision as to which of those methods to enact will therefore determine which of articles 46 (procedures for two-stage tendering), 48 (procedures for request for proposals) and 49 (procedures for competitive negotiation) will be retained.

2. With respect to request for proposals, competitive negotiation, request for quotations and single-source procurement, chapter V does not provide as full a procedural framework as chapter III does with respect to tendering proceedings (as well as two-stage tendering and restricted tendering), and as chapter IV does with respect to the principal method for procurement of services. This is mainly because the methods of procurement in chapter V involve more procedural flexibility than do tendering or the principal method of procurement of services. Some of the questions that for tendering, as well as for two-stage tendering and restricted tendering, are answered definitively in the Model Law (e.g., entry into force of the procurement contract) may be answered for those other methods of procurement in other bodies of the applicable law, which procuring entities will generally want to be the law of the State of the procuring entity. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as the formation of contract will be subject to the internationally uniform rules contained in the Convention. An enacting State may consider it useful to incorporate into the procurement law some of those solutions from other bodies of applicable law, as well as to supplement chapter V with rules in the procurement regulations. It should also be noted that chapters I and VI are generally applicable to all the methods of procurement.

* * *

Article 46. Two-stage tendering

The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: the flexibility afforded to the procuring entity in the first stage by the ability to negotiate with suppliers or contractors in order to arrive at a final set of specifications for what is to be procured, and, in the second stage, the high degree of objectivity and competition provided by tendering proceedings under chapter III. The general thrust of the provisions of article 46, which establish the specific procedures that distinguish two-stage tendering from ordinary tendering proceedings, has been noted in paragraph 20 of section I of the Guide. They include the requirement in paragraph (4) that the procuring entity should notify all suppliers or contractors remaining for the second stage of any changes made to the original specifications and should permit suppliers or contractors to forgo submitting a final tender without forfeiture of any tender security that may have been required for entry into the first stage. The latter provision is necessary to make the two-stage procedure hospitable to participation by suppliers or contractors since, upon the deadline for submission of tenders in the first stage, the suppliers or contractors cannot be expected to know what the specifications will be for the second stage.

* * *

Article 47. Restricted tendering

1. As noted in comment 2 on article 20, article 47 sets forth solicitation requirements designed to ensure that, in the case of resort to restricted tendering on the grounds referred to in article 20(a), tenders are solicited from all suppliers or contractors from whom the goods, construction or services to be procured are available, and, in the case of resort to restricted tendering on the grounds referred to in article 20(b), from a sufficient number of suppliers or contractors to ensure effective competition. Incorporation of those solicitation

requirements is an important safeguard to ensure that the use of restricted tendering does not subvert the objective of the Model Law of promoting competition.

2. Paragraph (2) promotes transparency and accountability as regards the decision to use restricted tendering by requiring publication of a notice of the restricted tendering in a publication to be specified by the enacting State in its procurement law. Also relevant in this regard is the generally applicable rule in article 18(4) that the procuring entity include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of one of the alternative methods of procurement provided for under chapter V.

3. The function of paragraph (3) is to provide that, beyond the specific procedures set forth in paragraphs (1) and (2), the procedures to be applied in restricted tendering are those normally applied to tendering proceedings, with the exception of article 24.

* * *

Article 48. Request for proposals

1. While request for proposals is a method in which the procuring entity typically solicits proposals from a limited number of suppliers or contractors, article 48 contains provisions designed to ensure that a sufficient number of suppliers or contractors have an opportunity to express their interest in participating in the proceedings and that a sufficient number actually do participate so as to foster adequate competition. In that regard, paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, but from a minimum of three if possible. The companion provision in paragraph (2) is designed to potentially widen participation by requiring the procuring entity, unless this is not desirable on the grounds of economy and efficiency, to publish in a publication of international circulation a notice seeking expressions of interest in participating in the request-for-proposals proceedings. In order to protect the procurement proceedings from inordinate delays that might result if the procuring entity were obligated to admit all suppliers or contractors that responded to such a notice, publication of the notice does not confer any rights on suppliers or contractors.

2. The procurement regulations may set forth further rules for the procuring entity in this type of a notice procedure. For example, the practice in some countries is that a request for proposals is sent as a general rule to all suppliers or contractors that respond to the notice, unless the procuring entity decides that it wishes to send the request for proposals only to a limited number of suppliers or contractors. The rationale behind such an approach is that those suppliers or contractors that expressed an interest should be given an opportunity to submit proposals and that the number asked to submit proposals should be limited only when important administrative reasons can be established. A countervailing consideration is that, while the wider notification procedure should not be foregone casually, such a procedure might create an extra burden for the procuring entity at a time when it is already busy.

3. The remainder of article 48 sets forth the essential elements of request-for-proposals proceedings as regards the evaluation and comparison of proposals and the selection of the winning proposal. They are designed to maximize transparency and fairness in competition, and objectivity in the comparison and evaluation of proposals.

4. The relative managerial and technical competence of the supplier or contractor is included in paragraph 3(a) as a possible evaluation factor since the procuring entity might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal. This provision should be distinguished from the authority granted to the procuring entity by virtue of article 6 not to evaluate or pursue the proposals of suppliers or contractors deemed unreliable or incompetent.

5. The "best and final offer" procedure required by paragraph (8) is intended to maximize competition and transparency by providing for a culminating date by which suppliers or contractors are to make their best and final offers. That procedure puts an end to the negotiations and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict the undesirable situation in which the procuring entity uses the price offer made by one supplier or contractor to pressure another supplier or contractor to lower its price. Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise their initial prices.

* * *

Article 49. Competitive negotiation

1. Article 49 is a relatively short provision since, subject to the applicable general provisions and rules set forth in the Model Law and in the procurement regulations, and subject to any rules of other bodies of applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. Those rules that are set forth in the present article are intended to allow that freedom to the procuring entity while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process, in particular by providing in paragraph (4) that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final offers, on the basis of which the successful offer is to be selected.

2. The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, or a description of the nature of services to be procured, and the desired contractual terms and conditions; and request the suppliers or contractors with whom it negotiates to itemize their prices so as to assist the procuring entity in comparing what is being offered by one supplier or contractor during the negotiations with offers from the other suppliers or contractors.

* * *

Article 50. Request for quotations

It is important to include in a procurement law minimum procedural requirements for request for quotations of the type set forth in the Model Law. They are designed to foster an adequate level and quality of competition. With respect to the requirement in paragraph (1) that suppliers from whom quotations are requested should be informed as to the charges to be

included in the quotation, the procuring entity may wish to consider using recognized trade terms, in particular INCOTERMS.

* * *

Article 51. Single-source procurement

The Model Law does not prescribe procedures to be followed specifically in single-source procurement. This is because single-source procurement is subject to very exceptional conditions of use and involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation which it would not be appropriate for the Model Law to specifically regulate. It may be noted, however, that the provisions of chapter I would be generally applicable to single-source procurement, including article 11 on record requirements and article 12 on publication of notices of procurement contract awards.

* * *

CHAPTER VI. REVIEW

1. An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system. Chapter VI of the Model Law sets forth provisions establishing a right to review and governing its exercise.

2. It is recognized that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

3. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

4. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

5. In view of the above, and in order to avoid impinging upon fundamental conceptual and structural aspects of legal systems and systems of State administration, the provisions in chapter VI are of a more skeletal nature than other sections of the Model Law. As indicated in the asterisk footnote in the Model Law at the head of chapter VI, some States may wish to incorporate the articles on review without change or with only minimal changes, while other States might not see fit, to one degree or another, to incorporate those articles. In the latter cases, the articles on review may be used to measure the adequacy of existing review procedures.

6. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an enacting State might include more detailed rules concerning matters that are not dealt with by the Model Law or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been presented.

7. Chapter VI does not deal with the possibility of dispute resolution through arbitration, since the use of arbitration in the context of procurement proceedings is relatively infrequent. Nevertheless, the Model Law does not intend to suggest that the procuring entity and the supplier or contractor are precluded from submitting to arbitration, in appropriate circumstances, a dispute relating to the procedures in the Model Law.

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Article 52. Right to review

1. The purpose of article 52 is to establish the basic right to obtain review. Under paragraph (1), the right to review appertains only to suppliers and contractors, and not to members of the general public. Subcontractors have been intentionally omitted from the ambit of the right to review provided for in the Model Law. This limitation is designed to avoid an excessive degree of disruption, which might impact negatively on the economy and efficiency of public purchasing. The article does not deal with the capacity of the supplier or contractor to seek review or with the nature or degree of interest or detriment that is required to be claimed for a supplier or contractor to be able to seek review. Those and other issues are left to be resolved in accordance with the relevant legal rules in the enacting State.

2. The reference in paragraph (1) to article 57 has been placed within square brackets because the article number will depend on whether or not the enacting State provides for hierarchical administrative review (see comment 1 on article 54).

3. Not all of the provisions of the Model Law impose obligations which, if unfulfilled by the procuring entity, give rise under the Model Law to a right to review. Paragraph (2) provides that certain types of actions and decisions by the procuring entity which involve an exercise of discretion are not subject to the right of review provided for in paragraph (1). The exemption of certain acts and decisions is based on a distinction between, on the one hand, requirements and duties imposed on the procuring entity that are directed to its relationship with suppliers and contractors and that are intended to constitute legal obligations towards suppliers and contractors, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, that are aimed at the general public interest, or that for other reasons are not intended to constitute legal obligations of the procuring entity towards suppliers and contractors. The right to review is generally restricted to cases where the first type of requirement is violated by the procuring entity. (See also comment 2 on article 30.)

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Article 53. Review by procuring entity (or by approving authority)

1. The purpose of providing for first-instance review by the head of the procuring entity (or of the approving authority) is essentially to enable that officer to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive stage. References to the approving authority in paragraph (1), as well as elsewhere in article 53 and the other articles on review, have been placed in parentheses since they may not be relevant to all enacting States (see paragraph 29 of section I of the Guide).

2. The policy rationale behind requiring initiation of review before the procuring entity or the approving authority only if the procurement contract has not yet entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the head of the procuring entity or of the approving authority could usefully require. The latter cases might better fall within the purview of hierarchical administrative review or judicial review.

3. The purpose of the time limit in paragraph (2) is to ensure that grievances are promptly filed so as to avoid unnecessary delays and disruption in the procurement proceedings at a later stage. Paragraph (2) does not define the notion of "days" (i.e., whether calendar or working days) since most States have enacted interpretation acts that would provide a definition.

4. Paragraph (3) is a companion provision to paragraph (1), providing that, for the reasons referred to in comment 2 on the present article, the head of the procuring entity or of the approving authority need not entertain a complaint, or continue to entertain a complaint, once the procurement contract has entered into force.

5. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see also comment 7 on the present article). Possible corrective measures might include the following: requiring the

procuring entity to rectify the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity not to issue the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

6. An enacting State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "54 or 57". If the enacting State provides judicial review but not hierarchical administrative review (see comment 1 on article 54), the reference should be only to the article appearing in this Model Law as article 57. If the enacting State provides both forms of review but requires the supplier or contractor submitting the complaint to exhaust the right to hierarchical administrative review before seeking judicial review, the reference should be only to article 54. If the enacting State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 54 or 57".

7. Certain additional rules applicable to review proceedings under this article are set forth in article 55. Furthermore, the enacting State may include in the procurement regulations detailed rules concerning the procedural requirements to be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient. The procurement regulations may also include detailed rules concerning the conduct of review proceedings under this article (e.g., concerning the right of suppliers or contractors participating in the procurement proceedings, other than the party submitting the complaint, to participate in the review proceedings (see article 55); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take).

8. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. To that end, paragraph (4) provides a thirty-day deadline for the issuance by the procuring entity (or by the approving authority) of a decision on the complaint; in the absence of a decision, paragraph (5) entitles the supplier or contractor that submitted the complaint to initiate administrative review under article 54 or, if such review is not available in the enacting State, judicial review under article 57.

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Article 54. Administrative review

1. States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 57).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an enacting State that provides both means of review does not have such rules, the State may wish to establish them by law or by regulation.

3. An enacting State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central procurement board), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board". It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

4. While paragraph (1)(a) establishes time limits for the commencement of administrative review actions with reference to the point of time when the complainant became aware of the circumstances in question, the Model Law leaves to the applicable law the question of any absolute limitation period for the commencement of review.

5. The suppliers and contractors entitled to institute proceedings under paragraph (1)(d) are not restricted to suppliers or contractors who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 54(2)), but include any other suppliers or contractors claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

6. The requirement in paragraph (2) is included so as to enable the procuring entity or the approving authority to carry out its obligation under article 55(1) to notify all suppliers or contractors of the filing of a petition for review.

7. With respect to paragraph (3), the means by which the supplier or contractor submitting the complaint establishes its entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

8. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In enacting the Model Law, a State may include all of the remedies listed in paragraph (3), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (3), those remedies may be added

to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. The approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 53(4)(b)). The policy underlying the approach in article 53(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 54(3) seeks to avoid impinging on those rules.

9. Optional language is included in the chapeau of paragraph (3) in order to accommodate those States where review bodies do not have the power to grant the remedies listed in paragraph (3) but can make recommendations.

10. With respect to the types of losses in respect of which compensation may be required, paragraph (3)(f) sets forth two alternatives for the consideration of the enacting State. Under Option I, compensation may be required in respect of any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit lost because of non-acceptance of a tender, proposal, offer or quotation of the supplier or contractor submitting the complaint. The types of losses that are compensable under Option II are broader than those under Option I, and might include lost profit in appropriate cases.

11. If the procurement proceedings are terminated pursuant to paragraph (2)(g), the procuring entity may institute new procurement proceedings.

12. There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts may be particularly disruptive of the procurement process and might not be in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law.

13. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations. Rules may be provided, for example, concerning: the right of suppliers and contractors, other than the one instituting the review proceedings, to participate in the review proceedings (see article 55(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

14. The overall period of 30 days imposed by paragraph (4) may have to be adjusted in countries in which administrative proceedings take the form of quasi-judicial proceedings

involving hearings or other lengthy procedures. In such countries the difficulties raised by the limitation can be treated in the light of the optional character of article 54.

* * *

Article 55. Certain rules applicable to review proceedings under article 53 [and 54]

1. This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article.

2. References within square brackets in the heading and text of this article to article 54 and to the administrative body should be omitted by enacting States that do not provide for hierarchical administrative review.

3. The purpose of paragraphs (1) and (2) of this article is to make suppliers or contractors aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. The possibility of broader participation in the review proceedings is provided since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

4. While paragraph (2) establishes a fairly broad right of suppliers and contractors to participate in review proceedings that they have not themselves generated, the Model Law does not provide detailed guidance as to the extent of the participation to be allowed to such third parties (e.g., whether the participation of such third parties would be at a full level, including the right to submit statements). Enacting States may have to ascertain whether there is a need in their jurisdictions for establishing rules to govern such issues.

5. In paragraph (3), the words "any other supplier or contractor or governmental authority that has participated in the review proceedings" refer to suppliers or contractors participating pursuant to paragraph (2) and to governmental authorities such as approving authorities.

* * *

Article 56. Suspension of procurement proceedings

1. An automatic suspension approach (i.e., suspension of the procurement proceedings triggered by the mere filing of a complaint) is followed in the procurement laws of some countries. The purpose of suspension is to enable the rights of the supplier or contractor instituting review proceedings to be preserved pending the disposition of those proceedings. Without a suspension, a supplier or contractor submitting a complaint might not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the supplier or contractor to avoid the entry into force of the procurement contract pending disposition of the review proceedings and, if an entitlement to interim relief would

have to be established, there might not be sufficient time to do so and still avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages). With an automatic suspension approach, there is a greater possibility of settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. At the same time, the disadvantage of an automatic suspension approach is that it would increase the extent to which the review procedures would result in disruption and delay in the procurement process, thus affecting the operations of the procuring entity.

2. The approach taken in article 56 with regard to suspension is designed to strike a balance between the right of the supplier or contractor to have a complaint reviewed and the need of the procuring entity to conclude a contract in an economic and efficient way, without undue disruption and delay of the procurement process. In the first place, in order to limit the unnecessary triggering of a suspension, the suspension provided for in article 56 is not automatic, but is subject to the fulfillment of the conditions set forth in paragraph (1). The requirements set forth in paragraph (1) as to the declaration to be made by a supplier or contractor in applying for a suspension are not intended to involve an adversarial or evidentiary process as this would run counter to the objective of a swift triggering of a suspension upon timely filing of a complaint. Rather, what is involved is an ex parte process based on the affirmation by the complainant of the existence of certain circumstances, circumstances of the type that must be alleged in many legal systems in order to obtain preliminary relief. The requirement that the complaint not be frivolous is included since, even in the context of ex parte proceedings, the reviewing body should be enabled to look on the face of the complaint to reject frivolous complaints.

3. In order to mitigate the potentially disruptive effect of a suspension, only a short initial suspension of seven days may be triggered through the fairly simple procedure envisaged in article 56. This short initial suspension is intended to permit the procuring entity or other reviewing administrative body to assess the merits of the complaint and to determine whether a prolongation of the initial suspension under paragraph (3) would be warranted. The potential for disruption is further limited by the overall thirty-day cap on the total length of the suspension in accordance with paragraph (3). Furthermore, paragraph (4) allows avoidance of the suspension in exceptional circumstances if the procuring entity certifies that urgent public interest considerations require the procurement to proceed without delay, for example, when the procurement involves goods needed urgently at the site of a natural disaster.

4. Paragraph (2) provides for the suspension for a period of seven days of a procurement contract that has already entered into force in the event that a complaint is submitted in accordance with article 54 and meets the requirements of paragraph (1). This suspension can also be avoided under paragraph (4) and, as noted above, is subject to extension up to a thirty-day total period under paragraph (3).

5. Since, beyond what is contained in article 57, the Model Law does not deal with judicial review, article 56 does not purport to address the question of court-ordered suspension, which may be available under the applicable law.

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Article 57. Judicial review

The purpose of this article is not to limit or to displace the right to judicial review that might be available under other applicable law. Rather, its purpose is merely to confirm the right and to confer jurisdiction on the specified court or courts over petitions for review commenced pursuant to article 52. This includes appeals against decisions of review bodies pursuant to articles 53 and 54, as well as against failures by those review bodies to act. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. The law applicable to the judicial proceedings will govern the question of whether, in the case of an appeal of a review decision made pursuant to article 53 or 54, the court is to examine de novo the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding. The minimal approach in article 57 has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.

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